STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, et al.,

Plaintiffs,

v.

DEAN KNUDSON, et al.,

Defendants.

Case No. 19-CV-00084
Case Code: 30701 & 30704

DEFENDANT GOV. TONY EVERS' RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

After the November 2018 elections of Democrat Tony Evers to the office of Governor of the State of Wisconsin and Democrat Josh Kaul to the office of Wisconsin Attorney General, in December 2018, Republican members of the Wisconsin Assembly's Committee on Assembly Organization and Republican members of the Wisconsin Senate's Committee on Senate Organization (collectively, "Organizing Committees") called for the Legislature to meet in an "Extraordinary Session." During that meeting, members of the Legislature purported to take actions: as the Legislature, passing three Acts (2017 Acts 368, 369 and 370); and as the Senate, confirming 82 Republican appointees to various government bodies. Plaintiffs brought this suit contending that the Acts and confirmations are null because the Extraordinary Session itself was convened without legal authority, i.e., *ultra vires,* in violation of Article IV, Section 11 of

the Wisconsin Constitution. Plaintiffs further contend that the call to convene issued by the Organizing Committees was similarly without authority, in violation of the quorum requirement in Article IV, Section 7 of the Wisconsin Constitution.[1] They have filed a Motion for Temporary Injunction, along with a Memorandum of Law in Support of Plaintiffs' Motion for Temporary Inunction ("Pls' Br." or "Plaintiffs' Brief," Doc. #86.)

Governor of the State of Wisconsin Tony Evers ("Governor Evers"), named in his official capacity as a Defendant in this case, has determined that Plaintiffs are likely to succeed on the merits of their claims. Governor Evers also agrees that there is no adequate remedy at law for the Constitutional violations, and taxpayers, as well as the Executive Branch, will suffer irreparable harm absent injunctive relief.[2] An injunction is necessary to preserve the statute quo pending a final decision from this Court. Plaintiffs' motion should be granted.

Governor Evers joins the Plaintiffs' brief and files this brief in support of Plaintiffs' motion to articulate further points of law and fact in support of Plaintiffs' motion. Governor Evers is particularly concerned with the harms that are occurring and will continue to occur vis a vis the Legislature's interference with the Executive Branch's core functions and its ability to provide services to members of the public.

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[1] For convenience, we refer to these enactments as laws, though we contend that they are in fact all null, i.e., not really laws at all.

[2] To be clear, this lawsuit challenges the constitutionality of the *process* by which the Legislature purported to act, through an Extraordinary Session (neither a regular session nor a special session), and thereby challenge the laws enacted and appointments confirmed. This lawsuit does not involve any substantive challenge of those laws, though this brief does include discussion of some of the substantive effects of some of the Extraordinary Session laws to demonstrate some of the harms that necessitate an injunction. A different lawsuit challenging many of the Extraordinary Session laws on substantive grounds is currently pending before Judge Remington, *Service Employees International Union (SEIU), Local 1, et al. v. Robin Vos, et al.,* Dane County Case No. 19-CV-0302.

Numerous provisions in 2017 Acts 369 and 370 are aimed at weakening and interfering with the authority and powers of the Executive Branch, and the efficient and effective operation of the administrative agencies. In addressing the irreparable harms wrought by the Executive Session, Governor Evers therefore focuses on those concerns.

FACTS

Guidance documents.

Act 369 creates a broad new classification of administrative agency documents called "guidance documents," Act 369, § 31 (creating Wis. Stat. § 227.01(3m)), and requires publication, 21 days' notice, comment, certification, and other requirements for all new **and** existing guidance documents, *id*. § 38. Existing documents that do not comply by July 1, 2019 will be rescinded by operation of law. *Id*. A separate section of Act 369 also requires agencies to retroactively insert statutory and administrative rule citations that support "any statement or interpretation of law" into agency websites, guidance documents, and other documents. *Id*. § 33.

A conservative estimate is that there are over 200,000 existing agency guidance documents across state government. (Nilsestuen Aff. ¶ 14)[3] This does not include an agency's email correspondence that meets the definition of a guidance document. *Id*. For example, the state's Department of Workforce Development ("DWD") uses documents and websites that likely meet the definition of "guidance" to administer state and federal laws, and to communicate with the public regarding compliance with

[3] The Affidavits of Ryan Nilsestuen, JoAnna Richard, Susan Karaskiewicz, Sandra Rowe, and Chad Koplien were originally filed in *Service and Employees International Union (SEIU), Local 1, et al. v. Robin Vos, et al.,* Dane County Case No. 19-CV-0302, and are attached to the Affidavit of Counsel, filed herewith.

forms; electronic filings; on-going weekly claims; financial and medical documentation for worker's compensation claims; eligibility determinations; financial processing and reimbursements for clients, vendors, service providers, and employers, to name just a few. (Richard Aff., ¶ 3.) Of DWD's six divisions, the Division of Vocational Rehabilitation has nearly 200 documents and answers to Frequently Asked Questions ("FAQs") that could qualify as "guidance," whereas the Workers' Compensation Division has over 72,000. (*Id*. ¶ 5.) Meanwhile, the Department of Corrections has located 450 existing guidance documents to date, and estimates it will issue 360 new documents every year. (Karaskiewicz Aff., ¶¶ 4-5.) The Department of Veterans Affairs, which provides a range of services and programs for Wisconsin veterans and their families, has identified 806 existing guidance documents so far, with 100 to 200 more created every year. (Koplien Aff., ¶¶ 2, 5-6.) The Department of Health Services has an early estimate of close to 30,000 documents to review, over 12,000 existing guidance documents to adopt, and an estimated 2,500 new documents to issue each year. (Rowe Aff., ¶ 10.)

An "entire new level of professional staff" will be required to conduct reviews for new and existing guidance documents, as well as information technology staff to update guidance on agency websites and in videos. (Richard Aff. ¶¶ 3, 5, 7; Rowe Aff. ¶ 10.)[4] Inserting statutory citations in agency websites and documents will also take significant staff time, including documents issued in other languages for Spanish,

[4] This assumes a technically feasible way to provide notice and accept comment on agency videos, interactive online modules, and webcasts can be developed. (Nilsestuen Aff., ¶¶ 20-22.)

Hmong, and other non-English speakers. (Richard Aff. ¶¶ 12-14.) Increases to administrative time within federally-funded programs will make it more difficult to comply with federal funding and program requirements. (*Id*. ¶ 18.) Costs to taxpayers at just the Department of Corrections will likely exceed $625,000 in the first year (Karaskiewicz Aff., ¶ 6), and annual costs at the Department of Veterans Affairs are estimated at $355,000 to $400,000 (Koplien Aff., ¶ 7.) Ultimately, compliance with the guidance documents legislation is likely to cost millions of taxpayer dollars. (Cain Aff. (Doc. #93), 1/19/19, ¶ 9.) The legislation included no additional appropriations to hire staff or otherwise implement the requirements of the law (Rowe Aff., ¶ 11), and the inability to hire new staff to comply with Acts 369 and 370 will compromise the legal operations of agencies such as Veterans Affairs (Koplien Aff., ¶ 8).

A major task of most agencies is to administer the law and help individuals, businesses, local governments, and those subject to regulation understand the law and how it applies to them and particular fact situations. (*E.g*., Richard Aff., ¶¶ 3, 8.) Agencies accomplish these tasks through letters, memoranda, manuals, guidebooks, outlines, website, pamphlets—in other words, "guidance documents." (*E.g*., Richard Aff., ¶¶ 8, 10, 13.) Guidance documents are usually not controversial and are both necessary and useful for the efficient and consistent application of the law and complex programs. (Cain Aff., 1/9/19, ¶ 5.) Because agencies will not be able to realistically update all guidance documents before the July 1, 2019 sunset date, it is likely that many documents will be rescinded without any replacement to assist the public. (Cain Aff. (Doc. #93), ¶ 11; Greene Aff. (Doc. #94), ¶ 6; Richard Aff., ¶¶ 8-9.) Rescission of these

documents will impair agencies like the Department of Natural Resources in applying the provisions of the law they are charged with enforcing and providing consistent interpretations that keep up with science and engineering advancements. (Cain Aff. (Doc. #93), ¶ 5.) Members of the public and vulnerable populations, such as people with disabilities, would otherwise rely on these documents to obtain services and rely on consistent application of the law. (Kerschensteiner Aff. (Doc. #91), ¶ 14.)

The application of Act 369, Section 38 to existing guidance documents, and the revisions to existing guidance and other documents required under Section 33, are practically impossible to achieve. (Richard Aff., ¶ 3; Nilsestuen Aff., ¶ 13; Rowe Aff., ¶¶ 8-12.) The guidance document obligations will impair performance of existing duties and other executive functions, like preparing the biennial budget, providing information to the public, and processing permit applications. Agencies will also have to delay other projects and duties to comply with the guidance document requirements in Act 369, negatively affecting the day-to-day operations of the agencies and the ability of agencies to serve the public. (Karaskiewicz Aff., ¶¶ 6-7; Richard Aff., ¶ 6; Rowe Aff., ¶¶ 11-12; Cain Aff., ¶ 10; Koplien Aff., ¶ 8.) Likely delays and compromised duties will include fulfillment of open records requests, reviews of agreements and compliance with fiscal estimates, biennial report review and rulemaking, monitoring current programs, and the ability of agency legal counsel to provide timely counsel and advice to their respective agencies. (Karaskiewicz Aff., ¶ 7; Rowe Aff. ¶ 11-12.) At the Department of Health Services, staff may also need to divert resources intended to improve delivery of Medicaid Services. (Rowe Aff., ¶ 11.) Because the July 1, 2019

guidance document sunset falls at the same time as the biennial budget is due, it is likely that staff time that would normally go towards developing the budget will be diverted to guidance duties. (Rowe Aff. ¶ 12; Nilsestuen Aff. ¶ 19.) In short, state agencies will not be able to comply with Act 369's guidance document provisions without significant expense, seriously delayed or diminished services, and a significant reduction in information provided to and relied on by the public. (Nilsestuen Aff., ¶ 13.) The ultimate impact will fall on those who rely on government interpretations of the law for services and help, including the unemployed and disabled (Kerschensteiner Aff., ¶ 14; Richard Aff., ¶ 3),

For new guidance documents, the 21-day comment period and other processes will make it impossible for agencies to post time-sensitive guidance, such as guidance on unemployment insurance to workers suffering sudden layoff. (*See* Richard Aff., ¶¶ 10, 19.)

Legislative body approvals—agencies.

Portions of the laws enacted during the Extraordinary Session also redistribute power and control over substantial agency duties away from the Executive Branch and to the Legislative Branch. For instance, Act 370, Section 10 requires agencies to obtain legislative approval before submitting requests to federal agencies for a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for authorization to implement a pilot program or demonstration project, including requests relating to the Medicaid program. Medicaid waivers allow a state to waive certain Medicaid program requirements that permit a state to provide

care for people who might not otherwise be eligible for the program. (Rowe Aff., ¶ 17.) The additional level of approval under Act 370, Section 10, and potential for disapproval and delay, is likely to interfere with DHS's ability to appropriately administer the Medicaid program and provide services to Wisconsin residents. (*Id.* ¶ 17.)

Legislative body participation and approvals—litigation.

Sections 5, 26, 30 and 97 of Act 369 remove litigation authority from the Governor and Attorney General, permit the legislature or committees thereof to intervene in and direct litigation, and require the approval of certain settlements by legislative bodies. This too is a significant reallocation of power away from the Executive Branch and to the Legislative Branch, which is already having practical effects: Act 369 has prevented the Governor and Attorney General from withdrawing from litigation regarding the federal Affordable Care Act in the Northern District of Texas. (Nilsestuen Aff., ¶¶ 23-24 & Exs 2, 3.) This litigation was initiated by the Executive Branch prior to the Extraordinary Session, but the Legislature has not allowed withdrawal—despite Governor Evers' judgment that he cannot "continue to allow the use of taxpayer resources toward a lawsuit that could undermine the health security of the people of the state." *Id.* Further, under sections 26 and 30, it is unclear how the government will properly comply with orders to appear at settlement conferences or comply with mediation requirements. The extra steps required by Act 369 will also make it more difficult to obtain settlements in time-sensitive matters. (Richard Aff., ¶ 21.)

ARGUMENT

The legal authorities for award of a temporary injunction are well-articulated in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Temporary Injunction ("Pls' Br.," Doc. 86) and will not be repeated here. The criteria are: 1) reasonable likelihood of success on the merits; 2) an injunction is needed to preserve the status quo; and 3) there is no remedy at law and irreparable harm will occur if an injunction is not entered.

I. Plaintiffs have a reasonable likelihood of success on the merits of their claim that the December 2018 Extraordinary Session was a meeting not authorized by law and therefore in violation of Article IV, Section 11, and consequently the actions taken are a nullity.

Plaintiffs argue that they have a reasonable likelihood of success on the merits of their claim that the December 2018 Extraordinary Session was *ultra vires* and that all actions taken therein are unenforceable. (Pls' Br. at 8-20.) Governor Evers agrees, joining Plaintiffs' arguments in support of this position and incorporating them herein by reference. Although Plaintiffs' arguments alone are sufficient to establish the reasonable likelihood of Plaintiffs' success on the merits, as explained below, several additional points of law and fact support their position.

The Wisconsin Constitution requires that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session." Wis. Const. art. IV, § 11. The Legislature's December 2018 Extraordinary Session is invalid because the Legislature failed to provide its meeting time "by law" as the Constitution requires.

As demonstrated in Section I.A, the phrase "at such time as shall be provided by law" in article IV, § 11 means that the Legislature may only meet in a session actually commenced at a law-provided time. No law provided the time for the meeting of the December 2018 Extraordinary Session.

Alternatively, as explained in Section I.B., even if the Constitution means something vastly more expansive—i.e., that the law must provide for a mechanism determining the time of a session's commencement or the general time that the Legislature shall actually meet—it is still violated here, because no law provided such mechanism for setting the December 2018 Extraordinary Session either.

A. The December 2018 Extraordinary Session was *ultra vires* because it did not meet at a "time…provided by law."

Wisconsin's Constitution restricts its Legislature to meeting "at the seat of government at such time as shall be provided by law, unless convened by the governor in special session." Wis. Const. art. IV, § 11. The Legislature's December 2018 Extraordinary Session is invalid because the Legislature did not set its meeting by law as the Constitution requires. That is, as shown in sections I.A.1-2, the Constitution requires all meetings of the Legislature to occur at a time *actually* provided by law. Today, the law only provides for *regular* session meetings of the Legislature.

Next, the December 2018 Extraordinary Session was not part of the Legislature's regular session for several reasons detailed in Section I.A.3. First, no law makes extraordinary sessions part of the regular session. Second, extraordinary sessions cannot be part of regular sessions because they only occur during regular session

adjournments. Third, extraordinary sessions are conceptually mutually exclusive from regular session meetings and floorperiods. Fourth, the Legislature has shown the will and ability to create an extraordinary session cognizable by the Constitution, and it could have done so here as well.

Alternatively, even if regular sessions *could* include extraordinary sessions generally, the December 2018 Extraordinary Session was not part of the 2018 regular session, which was already terminated, along with the Legislature's power to call itself into any session, by adjournment *sine die*.

1. The Constitution requires all meetings of the Legislature to occur at a time *actually* provided by law.

In interpreting the Constitution of the State of Wisconsin, "[t]he authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 310, 768 N.W.2d 868, 885 (citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110 (discussing statutory interpretation)). The text to be interpreted "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 2004 WI 58 at ¶ 45.

The constitutional provision at issue here is straightforward: "The legislature shall meet…at such time as shall be provided by law, unless convened by the governor in special session." Wis. Const. art. IV, § 11. The language is plain, and its construction only requires consideration of the "common, ordinary, and accepted" meanings of the

words. No resort to parsing of a technical or special meaning or consideration of extrinsic evidence is necessary. To say that the time of any meeting of the Legislature—except for those meetings called by the governor in special session—"shall be provided by law" means that a law must directly "supply," "furnish" or "make available" the time of the meeting.[5] Notably, the framers of the Constitution did not choose to say that the time of the meeting must be merely "provided *for* by law," which would have instead meant that law would only be required "to make arrangements for supplying means of support," "to make preparation to meet a need," or to "to take measures with due foresight."[6] Nor did the framers state that the meetings of the Legislature "shall be not inconsistent with law."

Therefore, any session of the Legislature may only be initiated at a time directly provided in law.

2. Law only provides for regular session meetings of the Legislature.

As noted by Plaintiffs, the Constitution narrowly defines "law" as a properly-styled bill that passes both houses of the Legislature, is signed by the governor (or passed by a supermajority over his veto), and is published. Wis. Const. arts. IV, § 17; V,

[5] *See* https://www.dictionary.com/browse/provide; https://www.merriam-webster.com/dictionary/provide; *Barritt v. Lowe*, 2003 WI App 185, ¶ 10, 266 Wis. 2d 863, 870, 669 N.W.2d 189, 192. *See also Black's Law Dictionary* 1224 (6th ed. 1990), defining "provide" as "[t]o make, procure, or furnish for future use, prepare; To supply; to afford; to contribute," and noting that "provided by law," "when used in a constitution or statute, generally means prescribed or provided by some statute."

[6] *See* https://www.dictionary.com/browse/provide; https://www.merriam-webster.com/dictionary/provide.

§ 10. Thus, only by statute, not by joint resolution or rule, may the Legislature provide anything "by law." (*See* Pls' Br. at 10.)

The Legislature has, generally speaking,[7] provided "by law" the time of only two full legislative meetings. One is a meeting for the Legislature "to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business." Wis. Stat. § 13.02(1). That organizing meeting is held on the first Monday in January in each odd-numbered year, unless that day falls on January 1 or 2, in which case it is held on January 3 instead. *Id.*

The second meeting provided "by law" is the regular session itself. Wis. Stat. § 13.02(2). The session "commence[s] at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3)." *Id.*

The statute calls for a third meeting in § 13.02(3), but that meeting is not for the full Legislature; rather it is only for the joint committee on legislative organization.

"Although titles are not part of statutes, Wis. Stat. § 990.001(6), they may be helpful in interpretation." *Aiello v. Pleasant Prairie*, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996); *see also State v. Dorsey*, 2018 WI 10, ¶ 30, 379 Wis. 2d 386, 409–10, 906 N.W.2d 158, 170. Here, any residual question as to whether Wis. Stat. § 13.02 provides for extraordinary sessions can be resolved by looking at its title. The title of Wis. Stat. § 13.02, "Regular Sessions," is unambiguous.

[7] As discussed *infra*, in Section I.A.3.d., extraordinary sessions appear to be provided by law in an extremely narrow circumstance not present in the December 2018 Extraordinary Session. *See* Wis. Stat. § 196.497(10(c). Thus, general references in this brief to "extraordinary sessions" intentionally ignore this outlier statute for the sake of clarity and efficiency.

Moreover, as Plaintiffs have demonstrated, the other factors that courts consider in interpreting the Constitution—constitutional debates and practices in existence at the time of its framing and the legislative interpretation evinced by the first law passed following its adoption—also support Plaintiffs' interpretation of art. IV, § 11. *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 18, 263 Wis. 2d 709, 723, 666 N.W.2d 816, 824. (See also Pls' Br. at 5, 13-19.)

As a result, the only legitimate meetings of the Legislature are the organizing meeting, the regular session and any special session called by the governor.[8]

3. The December 2018 Extraordinary Session was not part of the Legislature's regular session.

Because the only meetings provided by law are the organizing meeting and the regular session, an extraordinary session is only constitutionally valid if it is *part of* the regular session. The December 2018 Extraordinary Session was not part of any regular session. Regular sessions and extraordinary sessions are simply separate sessions. As explained below, this fact is obvious on the surface and recognized by law, and manifest in the Legislature's own conduct.

[8] As Plaintiff has demonstrated, the right of the Legislature to determine the rules of its own proceedings does not excuse the Legislature, even in interpreting or applying the rules of its proceedings, from its duty to conform its rules and actions to the Constitution, or this Court from its duty to enforcing the Constitution as to those rules and actions. (Pls' Br. at 11-13. *See also Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶¶ 18-20, 319 Wis. 2d 439, 456–58, 768 N.W.2d 700, 708–09 ("[E]ven if the statute might otherwise be characterized as a legislative rule of proceeding, we may interpret the statute and apply it to the legislative action to determine whether that action complies with the relevant constitutional mandates.")

a. No law makes extraordinary sessions part of the regular session.

As explained *supra* in Section I.A.1., the Constitution requires any legislative session to be authorized by law. However, not only does no law provide the meeting times of extraordinary sessions; no extraordinary sessions are provided by law at all, and no law so much as *relates* extraordinary sessions *to* regular sessions so as to make the former a subset of the latter.

It is only through non-law provisions that the concept of extraordinary sessions even exists. Neither 2017 Senate Joint Resolution 1, which laid out the Legislature's biennial schedule and claimed to reserve the possibility of an extraordinary session being called, nor Joint Rule 81, upon which that resolution claimed its authority, are law. See 2017 Senate Joint Res. 1, § 3.[9] (See also Pls' Br. at 9-10.) This reliance by the Legislature on non-law provisions is definitive evidence of extraordinary sessions' constitutional infirmity.

b. Extraordinary sessions cannot be part of regular sessions because they only occur during regular session adjournments.

Extraordinary sessions of the Legislature are also clearly distinct from regular sessions because they can only occur *during adjournments of* the regular session.

The Legislature is not perpetually in regular session throughout every minute of its term. Rather, the regular session[10] is only *actively in session* during a physical meeting of the Legislature on the floors of the respective houses during a "floorperiod," or a

[9] Attached to the Affidavit of Counsel as Exhibit F.

[10] The regular session begins anew annually, commencing at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided by the joint committee on legislative organization. Wis. Stat. § 13.02(2), (4).

stretch of days that the Legislature has pre-scheduled for regular session meetings. See 2017 Senate Joint Res. 1, § 1. This is demonstrated by the language of Wis. Stat. § 13.02(3), which requires that the joint committee on legislative organization shall meet and develop a work schedule, and for this meeting to take place not early in the odd-numbered year's *regular session,* but rather "early in each *biennial session period*." *Id.* (emphasis added). This different choice of words is highly significant. "Statutory language is read where possible to give reasonable effect to every word." *Kalal*, 2004 WI 58 at ¶ 46. Regular sessions thus comprise only a subset of time within the "biennial session period." [11]

At the end of each meeting of the regular session, the houses of the legislature adjourn themselves and the regular session until a pre-determined time for the next regular session meeting. Between meetings of the same floorperiod, the session is adjourned until the next meeting of the regular session. At the conclusion of such a meeting, the houses of the Legislature vote that "the [applicable house] stand adjourned until" the next day in that floorperiod on which the house plans to meet. See, e.g., Wis. Senate J., 103rd Reg. Sess., at 755 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 825 (Wis. 2018).[12] At the end of the last meeting of a floorperiod, including at the end of the last scheduled floorperiod meeting of 2018, legislators vote that "the [numbered

[11] 2017 Senate Joint Resolution 1 also recognized this distinction, providing that "the *biennial session period* of the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and that the *biennial session period* ends at noon on Monday, January 7, 2019." 2017 Senate Joint Res. 1, § 1(1) (emphasis added).
[12] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180220; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180221. The Senate votes that "the [numbered biennium's] Regular Session of the Senate stands adjourned" until the next scheduled meeting, underscoring that the regular session itself is adjourned upon the particular meeting's closure.

biennium's] Regular Session of the Senate[13] stand adjourned pursuant to Senate Joint Resolution 1." See, e.g., Wis. Senate J., 103rd Reg. Sess., at 786 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 833 (Wis. 2018); Wis. Senate J., 103rd Reg. Sess., at 869 (Wis. 2018).[14] That is, the house adjourns itself until the next meeting of the regular session as provided by the scheduling joint resolution.

Therefore, regardless of when a meeting of the regular session occurs, it concludes by adjournment of the regular session until the next scheduled regular session meeting. No regular session meeting may take place during the interim. Because the regular session is adjourned when an extraordinary session takes place, the latter cannot possibly be part of the former.

c. Extraordinary sessions are mutually exclusive from general session floorperiods.

Extraordinary sessions are distinct from regular session meetings and floorperiods not only as a matter of scheduling but conceptually as well. This distinction is recognized in law. The terms "floorperiod" and "extraordinary session" are recognized in statute as mutually exclusive under Wis. Stat. § 13.625 (1m)(b)1 ("A contribution to a candidate for legislative office may be made during [a certain] period only if the legislature has concluded its final floorperiod, and is not in special or extraordinary session.") Likewise, Wis. Stat. § 11.1205, which sets the allowable timeframes for the distribution of government materials by political candidates, treats

[13] The Assembly's adjournment is similar but omits specific reference to the regular session.
[14] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180222; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180222; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.

extraordinary sessions exactly like special sessions, not like regular session floorperiods. Wis. Stat. § 11.1205(2)(c)-(d).

This distinction is also recognized in 2017 Senate Joint Resolution. 1. The resolution recognizes extraordinary sessions as separate matters from both scheduled and extended floorperiods. See 2017 Senate Joint Res. 1, § 1(3)(a). And it also provides that extraordinary sessions are adjourned exactly as are special sessions, and *not* as are floorperiods. 2017 Senate Joint Res. 1, § 1(5). These same differences are also reflected in Joint Rule 81 and in the rules of the respective houses of the Legislature.[15]

Further, the Legislature in practice does not conceive of extraordinary sessions as alternations or additions to the regular session calendar or call the Legislature back into regular session in order to hold the extraordinary sessions. Journal entries for extraordinary sessions lack the caption for all regular session entries, being titled, for example, "December 2018 Extraordinary Session" instead of "One-Hundred and Third Regular Session." Compare, e.g., Wis. Assemb. J., Dec. 2018 Ext. Sess., at 968 (Wis. 2018); Wis. Senate J., Dec. 2018 Ext. Sess., at 978 (Wis. 2018); Wis. Senate J., 103rd Reg. Sess., at 786 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 833 (Wis. 2018).[16]

Finally, extraordinary sessions are functionally differentiated from scheduled regular session floorperiods because they may only take up business items specified in

[15] Available at https://docs.legis.wisconsin.gov/2017/related/rules/senate/10/93; https://docs.legis.wisconsin.gov/2017/related/rules/assembly/11/93.
[16] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20181203ede8; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180222; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180222.

the action calling them. Joint Rule 81(2)(b), (c). Thus, extraordinary sessions are distinct from regular session meetings as a matter of law, procedure, and purpose.

d. Previously, the Legislature has acted differently to create an extraordinary session cognizable by the Constitution, and it could have done so here as well.

The Legislature has previously demonstrated that it understands the Constitutional strictures on extraordinary sessions and that complying with them is not beyond its capabilities. For example, an extraordinary session meeting is provided for the purpose of approving certain agreements with federal agencies over the disposal of high-level radioactive waste and transuranic waste:

> Within 120 days after the bill is introduced the appropriate committees in each house of the legislature shall authorize an extraordinary session of the legislature to commence within the 120 days and to extend until the legislature passes the bill or passes a joint resolution which disapproves of the agreement or modification and returns the agreement or modification to the commission for renegotiation. If the 120-day period extends beyond the date specified in s. 13.02 (1), the 120-day period is deemed to commence on the first day the succeeding legislature convenes, unless a bill or joint resolution is passed prior to that time.

Wis. Stat. § 196.497(10(c).

The Legislature took a different approach to initiating an extraordinary session by law when it passed 1987 Act 4. That Act created, for the duration of a single biennium, a Wis. Stat. § 13.02(3m), which added an even-year budget session to the Legislative calendar to occur "not later than the date provided for the convening of the regular session of the legislature in that year."[17]

[17] Available at https://docs.legis.wisconsin.gov/1987/related/acts/4.pdf.

It cannot be disputed that through those previous enactments, the Legislature went infinitely farther in attempting to meet the requirements of the Constitution Article IV, § 11 than it did for the December 2018 extraordinary session, which does not come under Wis. Stat. § 196.497 or the since-repealed Wis. Stat. § 13.02(3m). The Legislature has therefore demonstrated itself to be capable of providing, "by law," a time for meetings of an extraordinary session. It simply failed to make such provisions for the December 2018 Extraordinary Session.

4. Even if regular sessions could include extraordinary sessions generally, the Legislature could not legally convene the December 2018 Extraordinary Session because the regular session had terminated by adjournment *sine die*.

As discussed above in Section I.A.3 of this brief, extraordinary sessions are not part of regular sessions due to operation of law, time, and legislative practice. However, even if this Court were to decide that an extraordinary session *could* be considered part of the regular session of the biennium in which it occurred, the December 2018 Extraordinary Session was not part of the 2018 regular session because the regular session had already terminated.

As described in Section I.A.1.b. above, a regular session is temporarily adjourned between floor periods. *See also State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 289–90, 125 N.W.2d 636, 642–43 (1964). However, this adjournment is different from the termination of a session, which effectively dissolves the Legislature. *Id.*; *see also See State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 555, 267 N.W. 433 (1936). "Although other

forms of adjournment that would terminate a session are possible, "[t]he ordinary form of termination of a session is by *sine die* adjournment." *Id.*[18]

A *sine die* adjournment—and, thus, the termination of the entire 2018 session—occurred more than half a year before the December 2018 Extraordinary Session was scheduled or convened and detailed in Plaintiffs' brief at page 17. When the Legislature last adjourned its regular session prior to the December 2018 Extraordinary Session, it did not adjourn until a specified date. *Compare Thompson*, 22 Wis. 2d at 289 ("When both houses 'adjourned' on August 6, 1963, it was expressly provided that the adjournment was only until November 4, 1963, and such an adjournment did not operate to dissolve the 76th session of the Wisconsin legislature.") Instead, it simply "adjourned pursuant to Senate Joint Resolution 1." Wis. Senate J., 103rd Reg. Sess., at 869, 895, 905 (Wis. 2018); Wis. Assemb. J., 103rd Reg. Sess., at 902, 937, 943 (Wis. 2018).[19]

At that point, there were no remaining scheduled dates for the rest of the biennial session period under Senate Joint Resolution 1, making the adjournment a

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[18] "The legislature adjourns '*sine die*' when it does not specify before adjourning a date on which members will reconvene." Mary E. Burke, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 Wis. L. Rev. 1395, 1432 (1989); *see also, e.g., State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662, 666 (1940); Wisconsin Assembly Chief Clerk, 1969, *Wisconsin Assembly Manual*, A-45 (first published Assembly manual following last amendment of Wis. Const., art. IV, § 11, providing that the Regular Session continues "until sine die adjournment of such Session")(attached to the Affidavit of Counsel as Exhibit G); *see also Black's Law Dictionary* 1385 (6th ed. 1990), defining "*sine die*" as "[w]ithout day; without assigning a day for a further meeting or hearing. Hence a legislative body adjourns sine die when it adjourns without appointing a day on which to appear or assemble again."

[19] Available at https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180417; https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180508; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180417; https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180508.

textbook *sine die* adjournment. The conclusiveness of that adjournment was embodied by the Legislature's official recognition that all bills that had not been passed by both houses of the Legislature were adversely disposed of at that time. (See Pls' Br. at 17.)

As a result, the Joint Committee on Legislative Organization could not call an extraordinary session—or any other session meeting of the Legislature—into being in late 2018, because the 2018 regular session had terminated, and the Legislature as a lawmaking body had thus dissolved.[20]

B. Even an expansive reading of the Constitution does not authorize the December 2018 Extraordinary Session.

As described *supra* in section I.A.1-2, the Constitution's language regarding the time of legislative meetings is meant to be restrictive. (See also Pls' Br. at 5, 13-19.) The phrase "at such time as shall be provided by law" in article IV, § 11 means that the Legislature may only meet in a session actually commenced at a law-provided time. However, even if this Court were to decide that the Constitution meant something vastly more expansive—for example, that the law must provide *for a mechanism determining* the time of a session's commencement or the *general time* that the Legislature shall actually meet—it still should find that the December 2018 Extraordinary Session was *ultra vires* because no law accomplished either of these outcomes.

[20] Governor Evers anticipates that a party might argue that a parade of horribles would result from a finding in favor of Plaintiffs' position because it would jeopardize enactments from past extraordinary sessions. Such an argument would lack strength, in part, because *sine die* adjournment affects only extraordinary sessions that occur during a small part of the calendar.

The only statute providing a time for any session to meet is Wis. Stat. § 13.02(2), which expressly concerns only the *regular* session. As discussed in Section I.A.3. above, the regular session does not include any extraordinary session.

Therefore, a party seeking to find statutory support for extraordinary sessions and applying such an extremely relaxed constitutional construction, would have to find its support in Wis. Stat. § 13.02(3). This subsection provides that:

> Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.

However, subsection (3) does not provide by law *any* session meeting times, let alone a time for an extraordinary session. All that it creates is a meeting of the Joint Committee on Legislative Organization and a mandate for that committee to develop and submit to the Legislature "a work schedule for the legislative session." The subsection does not even require the Legislature to *pass* the resulting joint resolution, let alone to adhere to the schedule. Thus, that subsection does not yield any session meeting times of any kind. Neither does it provide by law any other schedule determinations. Wis. Stat. § 13.02(3) thus does not satisfy the Constitution's mandate to provide, by law, the time for the Legislature's meeting in session.

That is sufficient to render the December 2018 Extraordinary Session invalid under any standard. Yet more infirmities exist. The work product that is required by Wis. Stat. § 13.02(3) is a "work schedule." "Schedule" is defined as

"a plan of procedure, usually written, for a proposed objective, especially with reference to the sequence of and time allotted for each item or operation necessary to its completion" or "program; especially a procedural plan that indicates the time and sequence of each operation."[21] In other words, the subsection requires specific, set times for each item.

The actual joint resolution that resulted from this subsection in the 2017-18 biennium provides a work schedule for the floor periods of the regular session. See 2017 Senate Joint Res. § 1(1), (2), (3) (b)-(x), (4), (5)(b)-(c), (6); 2. However, what it provides as far as *extraordinary* sessions are concerned can*not* reasonably be considered a "work schedule" because there are no specific, set times or a program. In fact, the resolution only states that an extraordinary session *may* be called when *there is no schedule*. See 2017 Senate Joint Res. § 1(3)(a). As a result, neither a work schedule for the December 2018 Extraordinary Session, nor a mechanism determining the time of its commencement, nor even the general time that it should be held, are provided by Wis. Stat. § 13.02 or any other law. The session thus violated even an expansive interpretation of Wis. Const., art. IV, § 11.

Therefore, Governor Evers agrees that Plaintiffs have a reasonable likelihood of success on the merits of their claim.

[21] See https://www.dictionary.com/browse/schedule; https://www.merriam-webster.com/dictionary/schedule; *see also Black's Law Dictionary* 1344 (6th ed. 1990), defining "schedule" as "[a]ny list of planned events to take place on a regular basis such as a train schedule or a schedule of work to be performed in a factory."

II. A temporary injunction is needed to preserve the status quo.

Governor Evers agrees with the Plaintiffs that a temporary injunction is necessary to preserve the status quo (Pls' Br. at 38-39), or more accurately, to return the status quo to pre-Extraordinary Session conditions. Most of the Extraordinary Session legislation is in effect now, and as described in the Facts section, the burdens of those laws are already being felt within the Executive Branch and the agencies. Those provisions that are not yet in effect, such as the agency guidance "sunset" on July 1, 2019, will begin to have a strong impact in the very near future as agencies attempt to comply with the legislation for hundreds of thousands of pieces of existing agency guidance. Pre-Extraordinary Session conditions served the State of Wisconsin well for decades, providing the Legislature with adequate oversight of rulemaking, permitting the Executive to implement the law and litigate on the State's behalf, and allowing for judicial review when necessary. The Court should maintain these conditions while it considers this case and the constitutionality of the procedure by which the laws were enacted.

To account for the possibility that after granting a temporary injunction, the Court could ultimately decide against Plaintiffs on the merits, the injunction should move the date of the guidance document "sunset" back for the same amount of time as the injunction is in effect. For example, if the injunction is in effect for four months, the July 1, 2019, sunset should be delayed until November 1, 2019. This will prevent the agencies from expending unnecessary resources to comply with the sunset on the chance that the injunction is lifted later. If the Court rules against Plaintiffs on the

merits, this arrangement still ensures compliance with the new law, but on a slightly different timeframe.

III. There is no adequate remedy at law, and Plaintiffs and the Executive Branch will suffer irreparable harms if a temporary injunction is not issued.

The Plaintiffs have moved to enjoin the operation and implementation of laws and appointments that, if Plaintiffs are right, were enacted and confirmed without legal authority and are void. Not only did the Organizing Committees and members of the Legislature act when they had no authority under the Wisconsin Constitution to do so, a significant and irreparable harm to democracy in and of itself, but many of the laws they passed in fact damage the fundamental balance of power among the three state branches of government, require the expenditure of tax funds which cannot be recovered from a wrongdoer, and will result in delay, diminishment, and denial of important government services to the people and businesses of the State of Wisconsin. The Governor concurs with Plaintiffs that an injunction is necessary to protect Plaintiffs from irreparable harm, and there is no adequate remedy at law. Not only will Plaintiffs suffer irreparable harm absent a temporary injunction, the Executive Branch, including the Governor and his ability to take care that the laws be faithfully executed, will be irreparably harmed as well.

The United States Supreme Court has consistently held that the violation of a constitutional right creates irreparable harm per se. *See Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") An injury is

irreparable if the legal remedy will not be adequate, *Pure Milk Prods. Co-op v. National Farmers Org*., 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979), or if the injury is "not adequately compensable by money damages." *Nettesheim v. S.G. New Age Prods., Inc.*, 2005 WI App 169, ¶ 21, 285 Wis. 2d 663, 702 N.W.2d 449. As Plaintiffs argue, injunctive relief is appropriate here to ensure the Legislature cannot continue to "with impunity violate the constitutional limitations of its powers." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878-79, 419 N.W.2d 249 (1988) (quoting *Columbia Cty. v. Wis. Ret. Fund*, 17 Wis. 2d 310, 319, 116 N.W.2d 142 (1962)).

In addition to the constitutional harm, the Affidavits submitted herewith and summarized in the "Facts" section of this brief detail how the Executive Branch is suffering irreparable harm as a result of the laws challenged here. Litigation involving the State has become more complex and costly. The Executive Branch is impeded from fulfilling its Constitutional duty to take care that the laws are faithfully executed, illustrated by the impediments to withdrawing the State from the challenge to the Affordable Care Act. The guidance document requirements of Act 369 are causing and will continue to cause administrative agency staff to divert their attention from their core missions, delay provision of services, compromise operations, and expend limited funding and resources on complying with those requirements and creating new layers of bureaucracy, rather than provide actual services, support and assistance to taxpayers. To manage the significant workload associated with the guidance document process without such negative effects, the agencies would need to hire numerous staff, using tax dollars, though no such funds have been provided for. Likewise, the requirements

contained in Act 370 for agencies to obtain permission from legislative bodies or others prior to seeking waivers and amendments in federal programs has the potential to interfere in agency program administration for the benefit of state taxpayers.

All of those harms ultimately befall the public and the Plaintiffs. Services to the public are being and will be disrupted, diminished, delayed, and even denied. Absent an injunction, tax dollars will be spent on implementing the challenged laws; these are funds that can never be recovered through a money judgment against a wrongdoer. The State will remain engaged in unnecessary, costly, and increasingly complicated litigation.

CONCLUSION

For the reasons stated above, Governor Evers supports the Plaintiffs' motion for a temporary injunction. If the Court grants the injunction, it should modify the effective date of certain provisions of Act 369, as requested in Section II, *supra*, regardless of its ultimate decision on the merits.

Respectfully submitted this 22nd day of February, 2019.

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